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# No. 74-1606

## In the Supreme Court of the United States

OCTOBER TERM, 1974

**HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEYER, MERLIN PLAMANN, VICTOR SCHROTH and RONALD SURPRISE, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and MARVIN OBRY, ROBERT KOHLS and GENE RIEDL, individually and as administrators of Hortonville Joint School District No. 1,**

*Petitioners,*

VS.

**HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE and RONALD HAMMOND,**

*Respondents.*

On Petition for Writ of Certiorari to the Supreme Court of the State of Wisconsin

# BRIEF FOR RESPONDENTS IN OPPOSITION

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*Respondents.*

On Petition for Writ of Certiorari to the Supreme Court of the State of Wisconsin

## BRIEF FOR RESPONDENTS IN OPPOSITION

Pursuant to Rule 24 of the revised Rules of the Supreme Court of the United States, respondents (who are appel-

lants below and conditional cross-petitioners in No. 74-1638) oppose the petition filed in this case on the grounds that this Court does not have jurisdiction thereof, there being no final judgment. In addition, there are no special and important reasons for granting review in this case and the considerations of Rule 19 of the revised Rules of the Supreme Court of the United States are not present.

## STATEMENT OF THE CASE

The statement of the case presented by the petitioners is both incomplete and argumentative. The respondents have filed a Conditional Cross-Petition for Writ of Certiorari to the Supreme Court of the State of Wisconsin, No. 74-1638, in which a more accurate statement of the case is presented.



## ARGUMENT

### I. THIS COURT DOES NOT HAVE JURISDICTION TO ENTERTAIN THE PETITION.

Jurisdiction for this Court to entertain the petition is said to exist under 28 U.S.C. §1257(3). That section allows review by this Court of decisions rendered by the highest court of a state under certain circumstances, but only if they are "final judgments or decrees". Without a final judgment or decree this Court lacks jurisdiction. *Montgomery Building & Construction Trades Council* v. *Ledbetter Erection Co.*, 344 U.S. 178, 180-81 (1952). In order for this Court to have appellate jurisdiction, the state court judgment must be final in two respects:

> "It must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co.* v. *Railroad Commission,* 324 U.S. 548, 551 (1945).

What is sought to be reviewed here is simply not a final judgment. The trial court had granted summary judgment for the petitioners (defendants and respondents below) on one cause of action and had sustained their demurrers to three others. The Wisconsin Supreme Court reversed the trial court's grant of summary judgment and remanded the case back to that court. At this time, this case effectively involves a petition for certiorari from a denial of a motion for summary judgment. Further proceedings with respect to the ultimate question involved in

this case, that is whether the teachers should have been fired, are to be conducted in the trial court. When that court ultimately decides the matter, its decision will again be appealable by either side to the Wisconsin Supreme Court. Thus, the case is subject to further review by the Wisconsin Supreme Court.

Nor is the Wisconsin Supreme Court's opinion final in the second respect cited in *Market Street R. Co., supra.* The litigation involved in this case is to determine what penalty, if any, can reasonably be imposed upon the teachers for engaging in a strike under the factual circumstances existing at the time. The Wisconsin Supreme Court's opinion constituted an intermediate step which allows for continuation of the litigation before a lower judicial officer who will make a decision on the merits.

The petitioners suggest that *Local No. 438* v. *Curry,* 371 U.S. 542 (1963), supports appellate jurisdiction in this case. That reliance is misplaced.

In *Curry,* the issue raised was whether the Georgia courts had jurisdiction over a controversy said to be within the exclusive powers of the National Labor Relations Board. The Court stated:

> "The issue ripe for review is not whether a Georgia court has erroneously decided a matter of federal law in a case admittedly within its jurisdiction . . . nor is it the question of whether federal or state law governs a case properly before the Georgia courts. . . . What we do have here is a judgment of the Georgia court finally and erroneously asserting its jurisdiction to deal with a controversy which is beyond its power and instead is within the exclusive domain of the National Labor Relations Board." 371 U.S. at 548.



In the case at bar, the issue sought to be reviewed by the petitioners is whether a state court has erroneously decided a matter of federal law in a case *admittedly within the state court's jurisdiction.*

In *Curry,* this Court also reiterated two policy reasons for not finding finality in cases where it obviously does not exist as a procedural matter, such as in the case at bar. First, the Court reiterated the "policy of 28 U.S.C. §1257 against fragmenting and prolonging litigation and against piecemeal reviews of state court judgments". 371 U.S. at 550. Second, the Court pointed out that it was reluctant to find finality unless the intermediate decision effectively resolved the case, left no further defenses in the state proceedings for the petitioner, and for all practical purposes terminated the litigation.

The petitioners here are asking for piecemeal review of state court proceedings. The Wisconsin Supreme Court has done nothing more than direct that the respondents receive a fair hearing. The decision of the Circuit Court would have allowed termination of the respondents' employment without any meaningful hearing and without any fair and impartial determination of the facts. The petitioners will be entitled, upon remand to the Circuit Court, to present any appropriate evidence they desire and attempt to convince an impartial decisionmaker that, in view of the circumstances underlying this suit, the respondents should be disciplined and that the appropriate discipline is discharge. If such a finding is made there will be no reason for the petitioners to ever seek review from this Court. Thus the decision of the Wisconsin Supreme Court left defenses to the petitioners, does not terminate the litigation and does not resolve the case.

## II. EVEN IF JURISDICTION EXISTS, THERE ARE NO SPECIAL AND IMPORTANT REASONS PRESENTED IN THIS CASE WHICH WOULD SUGGEST THAT REVIEW ON WRIT OF CERTIORARI IS THE APPROPRIATE EXERCISE OF JUDICIAL DISCRETION.

The principal consideration facing this Court in deciding whether to grant a petition for a writ of certiorari to a state court is whether "a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." Rule 19.1(a), revised Rules of the Supreme Court of the United States.

In this case, the Wisconsin Supreme Court decided that as a matter of state law and the particular local circumstances involved with that application of state law, the respondents had a property interest in continued public employment with the petitioners and that the action taken by the petitioners threatened the respondents' liberty interests. The Court went on to hold that as a result of the interests involved, and the fact that the petitioners acted under color of law, due process of law was required.

The analysis of state laws and their effects on personal interests was a matter of state legislative interpretation by a state judicial body. The federal question involved and answered affirmatively in that portion of the opinion was whether, given the property and liberty interests found to arise by virtue of state law, due process was required. The federal question involved and so stated has been answered in the affirmative many times by this Court, and the resolution of the question made by the Wisconsin Supreme Court was clearly in accord with the applicable decisions of this Court. *Board of Regents* v. *Roth,* 408 U.S. 564 (1972); *Perry* v. *Sinderman,* 408 U.S. 593 (1972); *Morrissey* v. *Brewer,* 408 U.S. 471 (1972); *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971); and *Goldberg* v. *Kelly,* 397 U.S. 254 (1970).



Having determined that due process was required under the circumstances, the Court went on to hold that the members of the Board of Education, who were involved as adversaries with the teachers in the underlying collective bargaining negotiations, could not fairly sit as impartial decisionmakers with respect to imposing punishment for conduct resulting from the underlying adversary dispute. No novel federal question of substance was resolved by that decision nor did the resolution deviate from applicable decisions of this Court. There is little question that in situations where due process is required, one element of due process so required is an independent decisionmaker. *Gagnon* v. *Scarpelli,* 411 U.S. 778 (1973); *Morrissey* v. *Brewer, supra; Ward* v. *Monroeville,* 409 U.S. 57 (1972); *Pickering* v. *Board of Education,* 391 U.S. 563 (1968); *In Re Murchison,* 349 U.S. 133 (1955); and *Tumey* v. *Ohio,* 273 U.S. 510 (1927).

There can also be little doubt that the Board members were not impartial decisionmakers with respect to the discipline sought to be imposed against the teachers in this case. The Wisconsin Supreme Court found that by virtue of state law the Board members were required to engage in collective bargaining with the teachers. When the bargaining broke down and the teachers took action prohibited by statute, the Board, by attempting to decide on "appropriate" discipline for the teachers, was in a position to rule on discipline in a fashion which could also re-

solve the collective bargaining dispute in the Board's favor.

The Wisconsin Supreme Court held that discharge was not an automatic penalty for engaging in a prohibited strike and that the penalty to be imposed, if any, had to be appropriate to the circumstances. Because of the Board's adversary position with respect to the teachers and the underlying dispute, the Court held that the Board could not provide the required impartiality necessary to determine fairly the appropriateness of penalty.

Finding the Board members to be other than impartial decisionmakers under the circumstances is neither novel nor inconsistent with decisions of this Court. In *Pickering* v. *Board of Education, supra,* at 578 n. 2 this Court stated:

> "Appellant requests us to reverse the state court's decision upholding his dismissal on the independent ground that the procedure followed above deprived him of due process in that he was not afforded an impartial tribunal. However, appellant makes this contention for the first time in this court, not having raised it at any point in the state proceedings. Because of this, we decline to treat appellant's claim as an independent ground for our decision in this case. On the other hand, *we do not propose to blind ourselves to the obvious defects in the fact-finding process occasioned by the Board's multiple functioning vis-a-vis appellant.*" (Emphasis supplied).

Such multiple functioning as existed here was equally offensive in that the Board, while ostensibly attempting to impartially determine whether the teachers should be disciplined in any fashion for engaging in a strike, was always aware that it could alleviate its problems with respect to collective bargaining with the teachers by the convenient expedient of discharge.



The state court here made a finding based on its unique insights into local laws and local realities that the special facts and circumstances present in the case made the risk of unfairness intolerably high. *Withrow* v. *Larkin,* ..... U. S. ....., 43 U. S. L. W. 4459 at 4466. It would have been incompatible for the School Board on one hand to suggest that the breakdown in collective bargaining was caused solely by the teachers and then go on to find that the teachers need not be disciplined for engaging in a strike because the circumstances giving rise to the strike justified their conduct. If the Board did that, "it would . . . implicitly be admitting error in its prior finding". 43 U.S.L.W. at 4466. Forcing the Board to face the possibility of admitting error as a prerequisite to ruling in favor of the teachers does indeed create a risk of bias or prejudgment or "a sufficiently great possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position." *Id.*

## III. THE CASE OF ARNETT v. KENNEDY HAS NO APPLICATION TO THESE FACTS.

The petitioners argue that the Wisconsin Supreme Court somehow erred in applying established due process principles to the facts of this case. The petitioners urge that *Arnett* v. *Kennedy,* 416 U.S. 134 (1974), "should be directly controlling". Petition for Writ of Certiorari, p. 8.

*Arnett* simply has no application here. It is limited to cases involving federal civil servants whose employment is tied to the Lloyd-LaFollette Act. It has not been extended beyond that classification by this Court and it should

not be now. See *Goss* v. *Lopez,* ..... U.S. ....., 43 U.S.L.W. 4181 (1975).

The *Arnett* decision presents a format for statutory construction. This Court held with respect to the Lloyd-La-Follette Act that Congress had granted certain minimal due process rights where none were previously required and that, under these special circumstances, no more rights were required by the Constitution. There is no comparable history with respect to Wisconsin teachers, and the Wisconsin Supreme Court, applying *Wisconsin* statutory construction, held that the *Arnett* statutory construction rationale was not applicable. The United States Supreme Court must accept state construction of state statutes.

Finally, Justices Blackmun and Powell, while in the majority in *Arnett,* held in their separate opinion that there was no due process violation because a subsequent fair hearing was provided by the federal statutes. Prior to the decision of the Wisconsin Supreme Court, the teachers were not provided with any subsequent fair hearing. This decision now provides such a fair hearing and thus provides a procedure which is similar to the one provided in *Arnett.*

## CONCLUSION

For the reasons stated above, as well as for the reasons stated in No. 74-1638, the Conditional Cross-Petition for Writ of Certiorari filed by the respondents herein, the respondents respectfully urge that the Petition for a Writ of Certiorari to the Supreme Court of Wisconsin be denied. In the event that said petition is granted, the respondents



ask that their Conditional Cross-Petition in No. 74-1638 be granted also so that all relevant issues in the case may be decided.

Respectfully submitted,

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